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CLOUGH CENTER LECTURE

A COMMON GAUGE: HARMONIZATION AND INTERNATIONAL LAW

JAMES BACCHUS*

Abstract: The international community should adopt more common standards, or common gauges, to help maximize global trade. Nations can capitalize on the international division of labor inherent in global trade by making many more of the individual parts of the global value chain interchangeable. The resulting global common gauge would lower costs and increase efficiency, productivity, quality, reliability, and diversity of products. To make common commercial standards, however, nations must refrain from promulgating trade barriers, such as domestic standards, that unnecessarily insulate and advantage national producers while discriminating against foreign firms. To combat this “regulatory protectionism,” the World Trade Organization should expand upon existing agreements, such as the TBT and SPS Agreements, that encourage WTO Members to adopt regulations that are no more restrictive on trade than necessary to achieve stated goals. This action, combined with the pressure of economic necessity, will develop a common gauge that will harmonize common standards and maximize global trade.

A favorite book of mine is *Speak, Memory*, the classic memoir by the Russian émigré, Vladimir Nabokov.¹ In one chapter, he tells of how, in the years shortly before the Bolshevik Revolution, his aristocratic family would flee every year from the snows of tsarist Russia to the sunny beaches of southern France. They traveled on the “then great and glorious” Nord-Express, the railway that connected St. Petersburg and Paris.

Or, to be more precise about that rail connection, and quoting the author, “I would have said: directly with Paris, had passengers not been obliged to change from one train to a superficially similar one at the Russo-German border . . . , where the ample and lazy sixty-and-a-

* © 2013, James Bacchus. Remarks delivered April 16, 2013, at the Clough Center for the Study of Constitutional Democracy, Boston College, Chestnut Hill, Massachusetts.

¹ See generally VLADIMIR NABOKOV, *SPEAK, MEMORY: AN AUTOBIOGRAPHY REVISITED* (revised ed. 1960).

half inch gauge was replaced by the fifty-six-and-a-half inch standard of Europe”²

I still recall being struck, when first reading Nabokov’s book many years ago, by the spectacle, in August of 1909, of young Vladimir, his extended family, their entourage of servants, and their vast assemblage of baggage, all being unloaded with considerable labor from one train and being taken in a long procession across the border and put on another train just like it—except for the “gauge” of width between the wheels and the rails of the two stretches of train tracks.

Even then, my interests tended more to the geopolitical than to the literary. So, for me, the question prompted by this passage all those years ago was not what it taught me about Nabokov’s vivid writing style; rather, it was: what does the fact that the railways of Russia and Europe were not connected by a common gauge teach us about all the many historical misconceptions between Russia and Europe?

Back then, I was immersed in the study of history in preparation for what I foresaw as a life spent as a history professor. I had no inkling then that mine would instead be a life spent in the law. And much of my study of history at the time was not of Russia, or Europe, but of the political and economic emergence of the United States of America.

Inspired to inquiry by my reading of Nabokov, I learned from further reading that the history of the United States may likewise have been influenced by the lack of a common gauge on the country’s railways. Before the Civil War, the railways of the North used one gauge and the railways of the South used another. So there was little commerce by rail between North and South. In this way as in other ways, the two were less than connected. Not until after the war was a common gauge embraced to connect America’s railways—and thus help connect and reunite America.

The eminent economic historian George V. Hilton has told the tale. For two decades following the war, freight from one region to the other was—like the Nabokovs’ baggage—still laboriously unloaded and loaded from one car to another in the border states where railroads of different gauges met. Then, in one single day, on May 31, 1886, in a massive effort months in the making, the spikes were pulled on thousands of miles of track all across the South, and the rails of the

² *Id.* at 141.

South were moved in by three inches to match the narrower gauge of the North.³

The newly driven spikes set a common gauge for the whole country, and helped spark a period of rapid regional economic development that historians have labeled the “New South.” This common gauge bound the North and the South together economically in ways that did not exist in the antebellum era. It is perhaps not too much to say that the commercial harmonization of a common railway gauge in the later years of the 19th century helped ease the needed transit toward the eventual communal harmony between North and South that emerged in the later years of the 20th century and is now largely assumed—despite some continuing sectional differences—in the basic unity of America in the 21st century.

The trade of commerce thrives on a common gauge. As my fellow travelers who serve as the Secretariat of the World Trade Organization have said succinctly in their most recent World Trade Report, there is “a general finding in the literature that harmonization increases . . . trade.”⁴ A common standard helps maximize trade. The flow of commerce grows where there is only one standard to follow, only one regulation to meet, only one gauge to use. Where there are many, the flow of commerce is less than it could be. Competing standards slow the flow of trade.

Thus, the history of commerce can be seen in many ways as the search for a common gauge. The Northern railway gauge adopted by the South in 1886 was identical to the British gauge. The gauge adopted by the early British railways was based on the width of medieval British wagon roads. The width of those roads can be traced to the width of the roads that united the Roman Empire.

The same can be said of untold numbers of other goods and services that are traded and provided in what has become more and more a truly global economy. The commercial need for a common gauge has spurred a long-lasting and continuing effort to secure common standards. From these common standards have emerged the international rules that we call “international law.” The commercial need for common standards and for other common ways of doing business internationally creates the international rules that are the most common kind of international law.

³ GEORGE V. HILTON, *AMERICAN NARROW GAUGE RAILROADS* 36 (1990).

⁴ WTO SECRETARIAT, *World Trade Report 2012 Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century*, 10, (2012), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf.

Indeed, it can be said with some assurance that the need for a common gauge in international commerce had much to do with the emergence of modern international law in the industrial age. As Mark Mazower recounts in his new book, *Governing the World*, one of the world's very first international organizations was the International Telegraph Union, which was established in 1865.⁵ The ITU was established, he explains, for a compelling commercial reason—"in order to overcome the delays that had been caused by the need to print out telegraph messages on one side of the border to walk them across to the other side."⁶

From these origins as an International Telegraph Union developed, over time, today's International Telecommunications Union, the specialized agency of the United Nations responsible for issues relating to information and communication technologies. Representatives of 193 member countries and 700 other affiliates work together writing global rules on these matters in a shiny spire overlooking the lake of Geneva just up the street from where I used to work at the WTO.⁷

Nor was the International Telegraph Union the only new international institution that emerged in the late 19th century to meet the needs of an industrializing economy in a shrinking world. Mazower explains that, among many other internationalizing initiatives, there were institutions established to make international rules to speed international postal delivery, to unify weights and measures, and to set one universal time. Safety-minded British engineers desirous of setting one standard size for screws and bolts, Mazower reminds us, "laid the foundation" for today's International Standards Organization.⁸ Broadening from its beginnings in mechanical engineering, the ISO now has members in 164 countries and 3,368 technical bodies that have published more than 19,500 international standards for products covering virtually every kind of manufacturing and technology.⁹

ISO rules are far from the only common standards that have been agreed by standard-setting organizations in recent decades. The Codex Alimentarius Commission sets standards for food safety. The

⁵ MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA* 102 (2012).

⁶ *Id.*

⁷ International Telecommunications Union, *About ITU*, available at <http://www.itu.int/en/about/Pages/default.aspx> (last visited Nov. 11, 2013).

⁸ MAZOWER, *supra* note 5, at 102.

⁹ International Standards Organization, *About ISO*, available at <http://www.iso.org/iso/home/about.htm> (last visited Nov. 11, 2013).

International Office of Epizootics sets standards for animal health. The International Plant Protection Convention sets standards for plant health. Regional and global standards of all kinds abound around the world, and they bind the world more tightly together in a global economy that is increasingly connected and increasingly one.

The logic of a common gauge can be limned by looking again into the division of labor in the pin factory described by Adam Smith in *The Wealth of Nations*. “Trade” is, of course, simply another name for “the division of labor.”¹⁰ All trade is a division of tasks in making goods and providing services. What distinguishes our economy in the 21st century from Smith’s economy in the 18th century is that the trade in tasks today has led to ever more elaborate subdivisions of the division of labor in ever more complex supply chains that increasingly include the entire world.

Production now is truly global, and, increasingly, much of international trade consists of trade in the intermediate goods that serve as inputs into the final finished goods that are ultimately sold to consumers. As Gary Hufbauer and Jeffrey Schott of the Peterson Institute for International Economics have recently summed it up, “A large share of 21st century trade requires integrated global supply chains that move intermediate and finished goods around the world. Intermediate goods account for 60 percent of global commerce, and about 30 percent of total trade is conducted between affiliates of the same multinational corporation.”¹¹ National borders are relevant to these global supply chains only because we choose to believe that national borders exist.

Nationality still denominates trade, and thus it still defines trade law and dictates how we choose up sides in trade disputes. We still pretend that products are “from” somewhere. We say they are “from” one country or another, and we engage in trade disputes over “our” products and “their” products as a result. Yet, with the ascendancy of global supply chains, value may be added to products in many places, and the most value may not be added where a product is supposedly “from.” Political economy today is all about “value added” in global supply chains that are best seen as global value chains. With these global value chains, products are no longer “from” anywhere. They

¹⁰ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 5 (Penguin Books 1982) (1776).

¹¹ Gary Hufbauer & Jeffrey Scott, *Payoff from the World Trade Agenda 2013*, Apr. 2013 Peterson Inst. for Int’l Econ. 11.

are “from” everywhere, and they are traded everywhere through the workings of the chain.

Smith taught us that the “division of labor” that is “trade” is limited only by the extent of the marketplace. With our successes over the past half century in lowering tariffs and other barriers to trade, with the willingness by emerging countries in the past two decades to open up their economies wider to the wider world, with the revolutionary rise of new communications and information technologies, and with all the new advances in travel and transit that can move people and goods with unprecedented speed around the planet, the extent of the marketplace for thousands upon thousands of goods and services has become worldwide. Through global trade, this international division of labor has given us unprecedented global prosperity.

Now, consider this. The division of labor through global value chains divides up the tasks of making these goods and providing these services. If these tasks can be made identical—if these parts of the global value chain can be made interchangeable—then how much more prosperous can the world become? What would Eli Whitney or Cyrus McCormick or Henry Leland or Henry Ford tell us about the potential of interchangeable parts for mass production and widespread prosperity? Or, for that matter, Bi Sheng, who first employed the concept of interchangeable parts by using moveable type a thousand years ago in China?

The benefits of a common gauge globally can be many. Lower costs. Higher efficiency. More productivity. Enhanced quality. Greater reliability. More consumer choices made more widely available by an international division of labor increased by the interchangeable parts that can arise from common global standards. For example: why have one set of specifications for an industrial fastener in one country and another set of specifications for the same fastener serving the same purpose in another? Cannot those two countries agree on what is needed in one of Adam Smith’s famous pins to be sufficient to help hold a building up? Cannot all countries agree? If they do agree, can’t they have identical or mutually recognized certification and testing procedures for that pin? Won’t that agreement on a common standard for making pins ease and thereby increase the international trade in pins and thereby add to our overall prosperity?

The World Economic Forum, in collaboration with Bain & Company and the World Bank, has recently released a significant study of supply chain barriers to international trade entitled “Enabling Trade:

Valuing Growth Opportunities.”¹² Their conclusion: “Reducing supply chain barriers to trade could increase GDP up to [six] times more than removing tariffs,” and, overall, it “could increase GDP by nearly 5% and trade by 15%.”¹³ Supply chain trade barriers take many forms. Red tape in border administration. Lack of transportation and communications infrastructure. And more. One common thread, though, to all the worldwide complaints about supply chain barriers to trade is always the needless costs arising from the endless duplications occasioned by the conflicts in competing regulations and the absence of common standards.

Traditionally, professors of international law and practitioners of international diplomacy have tended not to focus much on such mundane matters as the making of common commercial standards. Henry Kissinger himself supposedly once said—perhaps apocryphally—that he had little interest in learning about trade in butter. From this I conclude that he would likewise have little interest in trade in pins. After all, how could such a trivial matter as mere commerce have any consequence at all relevant to the weighty legal and diplomatic tasks of war and peace?

Lately this has been changing. This has been changing not least because of the unfolding work of the World Trade Organization. The WTO’s dull dealings with the mundane matter of commerce in butter, pins, and the like are increasingly the most prolific source of additional international law. The WTO Appellate Body and other jurists in WTO dispute settlement have produced more international law in the past two decades than the International Court of Justice in the Hague has produced in the entire past century. The proliferation of WTO rules and WTO rulings has added enormously in just a few years to the growing body of overall international law. Moreover, increasingly, WTO rules and WTO rulings are extending far beyond the traditional confines of butter and pins and into almost every corner of global concern.

Traditional trade issues such as tariffs and customs continue, to be sure, to be an important part of international trade law. (I say this as someone who spent several months some years ago striving in a judgment in a WTO appeal to isolate once and for all the timeless definition of an “ordinary customs duty”—and concluded—I think

¹² WORLD ECONOMIC FORUM, *ENABLING TRADE: VALUING GROWTH OPPORTUNITIES* (2013) available at www3.weforum.org/docs/WEF_SCT_EnablingTrade_Report_2013.pdf.

¹³ *Id.* at 4.

correctly—by not offering any definition at all.) This said, international trade law has long since ceased to be mainly about the tariffs levied and the customs procedures applied down at the port. Too, even at the port, containerization has helped open the way to the harmonization of common standards.

Indeed, trade law has never been solely about tariffs and customs. For example, Article III:4 of the General Agreement on Tariffs and Trade, which sets out the fundamental non-discrimination principle of “national treatment” for foreign products when competing with like domestic products in the domestic marketplace, has, from the very beginning, since 1947, applied to all internal “laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use” of traded products.¹⁴ This certainly includes standards set out by internal regulations. And, as successive rounds of global trade negotiations have reduced tariffs, the persistence of distinctive and disparate national standards in internal regulations for traded goods and services has risen as a divisive trade issue.

According to the OECD, today about 80 percent of all world trade—directly or indirectly—involves standards.¹⁵ Out there among all those ever-extending and ever-subdividing value chains of global commerce, we are increasingly seeing evidence that standards can not only serve to bind the world together; they can also be used to help keep the world apart. Countries that have made tariff concessions with one hand are becoming ever more creative in taking them back with the other hand by applying discriminatory regulations. Constrained by international law from raising tariffs, they are erecting new barriers to trade in the form of domestic standards. Even as international standards continue to multiply through the work of the ITU, the ISO, and numerous other international standard-setting organizations, national—and sometimes regional—sanitary and phytosanitary measures, technical regulations, and other standards of vast variety are increasingly employed as a form of what rightly has been called “regulatory protectionism.”

Sallie James and Bill Watson of the Cato Institute have recently published a perceptive paper on “regulatory protectionism,” which they define as “the use of regulatory policy to discriminate against

¹⁴ General Agreement on Tariffs and Trade, art. III:4, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

¹⁵ Org. for Econ. Co-operation and Dev., *Regulatory Reform and International Standardisation*, at XX, TD/TC/WP(98)36FINAL (Jan. 29, 1999).

foreign firms in a way that is not necessary to achieve a legitimate objective.”¹⁶ As they point out, drawing the right line as a matter of international law between legitimate regulatory measures that serve a legitimate public purpose and protectionist measures that serve the purpose mainly of insulating and advantaging national producers is moving to the forefront in the shaping of a new global trade agenda for the 21st century.¹⁷

As we saw in the second half of the 20th century, with the success of the GATT and with the eventual establishment of the WTO, trade can help bring and bind the world together. So too can the law of trade. What is more, I believe (admittedly a bit idealistically) that the success of the international rule of law in trade can, by example, help bring and bind the world together by inspiring the increased success of the international rule of law outside the realm of trade. As it is, already, the centrality of standards to so many regulatory concerns that affect trade shows us, as do so many other aspects of the emerging new agenda of trade, that the reach of trade law extends already to many of those other realms.

Is your food safe? Will your phone make the call? Can you breathe the air? Can you drink the water? Do the lights work? Will the “pins” break and the building fall down? Will your “telegraph” in the form of a digital text message get from here to there, and will the person there be permitted to read it? These are all already questions relating to trade law, or soon will be. Further, they all can involve “regulatory protectionism.”

In truth, “regulatory protectionism” is nothing new. It has been happening ever since we first began to find success in lowering tariffs decades ago. Having put aside history to study law, I first encountered the emerging issue of standards as a non-tariff barrier to trade when I arrived as a political appointee in the Office of the United States Trade Representative in 1979 and expressed the evidently novel desire—for a political appointee—to learn the substance of trade law. I was handed a then brand new international trade agreement that I was told was the “standards code.”

I have long since realized that I was given this assignment as a newcomer to trade because standards then were still on the periphery of trade concerns. The standards code was concluded by the Con-

¹⁶ K. William Watson & Sallie James, *Regulatory Protectionism: A Hidden Threat to Free Trade*, 723 CATO INST. POL’Y ANALYSIS 1, 2 (2013).

¹⁷ *Id.*

tracting Parties to the GATT during the Tokyo Round of global trade negotiations as a way of beginning to confront the emergence of standards as obstacles to trade. It bound only those countries that signed it, and it was not really enforceable even against them. It was, alas, largely ignored. Yet the standards code was nevertheless an essential start toward defining and disciplining “regulatory protectionism.”

A dozen years later, while a Member of Congress, I helped enact the implementing legislation for the Uruguay Round trade agreements that created the WTO. Among the many new trade agreements we approved then were two that built on the experience of the standards code—the WTO Agreement on the Application of Sanitary and Phytosanitary Measures and the WTO Agreement on Technical Barriers to Trade. The SPS Agreement deals with measures relating to human, animal, and plant life, health, and safety.¹⁸ The TBT Agreement deals with other standards and regulatory measures of all kinds that affect trade.¹⁹

Unlike the standards code, the SPS Agreement and the TBT Agreement are automatically binding on all WTO Members, and are fully enforceable in WTO dispute settlement. As WTO Members agreed in establishing the WTO, dispute settlement decisions by the WTO are enforceable in that they are backed by the ultimate “last resort” of economic sanctions against countries that choose not to comply with WTO rulings on the obligations in WTO rules. Given this potential price for non-compliance, WTO Members almost always choose to comply with WTO rulings.

Eight years as a judge in WTO dispute settlement gave me ample opportunity to acquaint myself with both the SPS Agreement and the TBT Agreement, and I have continued to delve their legal depths in the years since I left the WTO. Today, I am far from alone in focusing more and more of my attention on these two successors to the standards code. For standards are no longer at the periphery of the trade debate; with the continuing evolution of a fully global economy connected by the endless intricacies of global value chains, and with the concurrent rise of “regulatory protectionism,” standards are now at the very center of the trade debate.

¹⁸ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

¹⁹ Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

Research by the World Bank and the United Nations Conference on Trade and Development has shown that technical barriers affect about 30 percent of international trade, and that SPS measures affect about 15 percent of international trade, including more than 60 percent of trade in agricultural products.²⁰ Furthermore, this research has shown that the use of non-tariff measures as barriers to trade is rising.²¹

So it should come as no surprise that, within the WTO, an increasing number of international trade disputes involving standards and related issues are arising under the SPS Agreement, the TBT Agreement, and the GATT. In particular, and importantly, in a series of landmark rulings this year, my successors on the WTO Appellate Body have clarified the meaning and the interrelationship of some of the most basic provisions of the TBT Agreement involving technical regulations relating to the domestic sale of tuna, beef, and clove cigarettes.

These subjects may seem more than mundane to some, but, as might be mentioned to Secretary Kissinger, some of the landmark rulings of the Supreme Court of the United States interpreting the scope of the Commerce Clause of the U.S. Constitution during the New Deal in the 1930s involved the mundane subject of butter.²² In like manner, the latest rulings of the Appellate Body on the TBT Agreement will ultimately reach in their implications into virtually every aspect of the global economy.

Meanwhile, outside WTO dispute settlement, the worldwide debate is intensifying about where and how to draw the right line between legitimate regulation and “regulatory protectionism.” In bilateral relations between countries such as China and the United States, in regional groups such as APEC, in regional negotiations such as those on proposed trans-Pacific and trans-Atlantic trade agreements, and, of course, in the marathon Doha Round of global trade negotiations and other global deliberations by the Members of the WTO, the issue of standards is at the center of the debate.

At this center, the debate over standards is defined fundamentally by the fact that economics and politics are hard to connect. Economics knows no borders. Politics is defined by borders. The politicians find it hard to respond to the borderless economics of global value

²⁰ U.N. Conference on Trade and Dev., New York & Geneva, 2013, *A Preliminary Analysis on Newly Collected Data on Non-tariff Measures*, at iii, UNCTAD/ITCD/TAB/54.

²¹ *Id.*

²² *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942).

chains. In the increasing debate over common standards, perhaps more than in any other aspect of the current trade debate, the baggage of both economics and politics is piled up, separately, beside the railway tracks, awaiting a connection that can best come from global agreement on global rules.

The two scholars at the Cato Institute have suggested that the most important rule we need is one we already have. In their work on “regulatory protectionism,” they have argued that the connection that should be used to link economics and politics where a proposed standard is concerned is the extent of the restriction that standard would impose on trade. Say Sallie James and Bill Watson, “Requiring agencies to consider and evaluate the impact of a proposed regulation on international trade could limit the incidence of protectionism.”²³

The particular focus of their study is the United States, which, I should perhaps point out, was the losing party in all three of the recent landmark disputes over technical regulations in the WTO, on tuna, beef, and clove cigarettes. (In full disclosure, I should note, too, that I was among the legal counsel advising Mexico as the prevailing party in the tuna and beef disputes, and Brazil as an interested third party in the clove cigarette dispute.) James and Watson advise that, “Prior to implementing a new regulation, federal agencies should be required to evaluate the possibility that less trade-restrictive alternatives could meet regulatory goals as effectively as their preferred proposal.”²⁴ They say, “New limits should be placed on the discretion of administrative agencies to ensure that regulations meet WTO requirements. In addition to scientific risk assessment and cost-benefit analysis, agencies should consider whether proposed rules are more trade restrictive than necessary to meet their stated goals. Meeting this WTO requirement would prevent almost all regulatory protectionism.”²⁵

I agree. In addition, and although the Cato scholars confined their comments in their paper to regulations applied by the United States, I am confident they would agree with me that every other Member of the WTO should do the same. The United States is certainly not alone in being accused of “regulatory protectionism.” Think, for example, of the charges that have been made by their trading partners about China’s strategic industries initiative or Europe’s

²³ Watson & James, *supra* note 16, at 19.

²⁴ *Id.* at 1.

²⁵ *Id.* at 3.

data privacy directive or Russia's whole array of restrictive measures resembling Matryoshka nesting dolls. There is no lack of examples of measures that have been applied by almost every Member of the WTO that might be subject to the charge of "regulatory protectionism."

Moreover, and as James and Watson acknowledge, the obligation to act in a way that imposes the least possible restriction on trade consistent with a legitimate regulatory purpose is already an obligation to which every Member of the WTO has agreed by signing the WTO treaty, and by which every Member of the WTO is therefore already bound. The SPS Agreement and the TBT Agreement are both part of the WTO treaty, and I refer you in the treaty to Article 5.6 and Footnote 3 of the SPS Agreement and to Article 2.2 of the TBT Agreement, which spell out this obligation in no uncertain terms.²⁶

Article 5.6 of the SPS Agreement states, "Members shall ensure that [SPS] measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility."²⁷ Footnote 3 to this provision explains that "a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."²⁸ Similarly, Article 2.2 of the TBT Agreement provides that "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective; taking account of the risks non-fulfillment would create."²⁹

Whether any particular measure applied by any WTO Member is inconsistent with these treaty obligations is a question to be resolved, as we like to say in the WTO, "on a case-by-case basis." Having judged more than a few WTO disputes, I can assure you: every case is indeed different. The facts always matter. The point is, these obligations already exist. Better by far to comply with these obligations than to have them quoted against you in an appeal in WTO dispute settlement.

All this said, we should not by any means leave the making of connections where standards are concerned solely to the judges in WTO dispute settlement. The clarification of rules in dispute settlement can only go so far, and, though some obligations already exist,

²⁶ SPS Agreement, *supra* note 18, art. 5.6; TBT Agreement, *supra* note 19, art. 2.2.

²⁷ SPS Agreement, *supra* note 18, art. 5.6.

²⁸ *Id.* art. 5.6 n.3.

²⁹ TBT Agreement, *supra* note 19, art. 2.2.

others must be established. This can only be done through international negotiations that improve existing rules and that agree on the new rules needed to ensure appropriate domestic space for legitimate regulation while fighting back against “regulatory protectionism.” Through further rule-making, we must build on the successes so far of the SPS and TBT agreements, and of the whole host of global standard-setting organizations. In the WTO and elsewhere, we must focus as a high priority on finding a common gauge through the harmonization of standards.

Harmonization is not required by the WTO treaty, but it is encouraged. The words of the WTO treaty have been agreed by all the countries that are Members of the WTO, and those words voice their shared goals. Both the SPS Agreement (in Article 3.1) and the TBT Agreement (in Article 2.6) speak of the aim of harmonizing regulatory measures “on as wide a basis as possible.”³⁰ Importantly, too, both agreements also establish (in Article 3.3 of the SPS Agreement and in Article 2.5 of the TBT Agreement) a rebuttable presumption legally that compliance with a relevant international standard is consistent with the WTO treaty for purposes of WTO dispute settlement.³¹

Standardization can also be achieved *de facto* through mutual recognition. Short of full harmonization, both the SPS Agreement (in Article 4.1) and the TBT Agreement (in Article 2.7) encourage WTO Members to accept the differing standards of other WTO Members as “equivalent” to their own if it can be shown that they accomplish the same purposes.³² The SPS Agreement, in addition, encourages (in Article 4.2) the negotiation of mutual recognition agreements on the equivalency of specified SPS measures.³³

The way forward toward standardization through mutual recognition or harmonization is easier with some issues than others. Where one country requires that the vehicle identification number for an automobile be stamped on one end of a windshield and another country requires that the VIN number be stamped on the other end of the windshield, the opportunity for a compromise that will facilitate trade is obvious. Where one country has one regulatory view of genetically-modified food and another country has an entirely different view, the negotiations will be a bit more complicated. Still, negotiations are needed if agreement on international rules can safeguard

³⁰ SPS Agreement, *supra* note 18, art. 3.1; TBT Agreement, *supra* note 19, art 2.6.

³¹ SPS Agreement, *supra* note 18, art. 3.3; TBT Agreement, *supra* note 19, art 2.5.

³² SPS Agreement, *supra* note 18, art. 4.1; TBT Agreement, *supra* note 19, art 2.7.

³³ SPS Agreement, *supra* note 18, art. 4.2.

legitimate domestic interests while also increasing the flow of international trade and investment.

In working toward harmonization, Members of the WTO should look first to the words on which they have already agreed in the SPS and TBT agreements in the WTO treaty, and to how some of those words have been clarified in WTO dispute settlement. They should look first also to the WTO itself as a forum for their further negotiations on standards. As a practical matter, they may need, initially, to take partial approaches, but they should aim to act multilaterally, and their shared goal should be to write new rules that will, ultimately, and ideally, apply standards globally.

It is encouraging that the issue of standards has been addressed in a number of recently concluded bilateral trade agreements, and that it is now drawing considerable attention on the negotiating table in current and contemplated regional negotiations. "WTO-plus" obligations on standards issues have been included in recent free trade agreements negotiating by the United States with a number of other WTO Members. The United States and the handful of other WTO Members engaged in negotiations on a Trans-Pacific Partnership are focusing as a cross-cutting issue on reducing regional divergences in standards through "regulatory coherence." Likewise, the United States and the member states of the European Union are anticipating that many of the benefits anticipated from their proposed Trans-Atlantic Trade and Investment Partnership would result from mutual recognition and from some harmonization of standards.

I applaud these efforts. If still in the Congress, I would be supporting these initiatives, and I would surely vote for them. But why pursue these initiatives outside the multilateral framework of the WTO? Every single country engaged in these regional negotiations is a Member of the WTO. If they wish to improve on current WTO obligations on standards, they can do so much more effectively within the framework of the WTO treaty.

I share in the widespread frustration with the seemingly endless impasse in the Doha round of multilateral trade negotiations under the auspices of the WTO. Under the negotiating approach chosen by the Members of the WTO in launching the round more than a decade ago, nothing can be agreed until everything is agreed by "consensus" of every one of the more than 150 countries engaged in the negotiations. So far, this has not been possible. We shall perhaps see at the WTO Ministerial Conference in Bali at yearend if anything can be achieved from the Doha round.

But the decision to make the Doha round a “single undertaking”—requiring a consensus on everything before there can be an agreement on anything—was a choice made by the Members of the WTO. They could have made another choice under the existing rules in the WTO treaty. They could still do so in going forward. The WTO treaty also permits WTO Members to conclude WTO agreements among some but not all WTO Members when a self-selected subset of WTO Members is willing to accept new obligations without waiting for all other WTO Members to agree to do so. This approach has been followed successfully by Members of the WTO on information technology and on government procurement. It has been followed successfully on financial services and on basic telecommunications services. Significantly, it is being tried now by the United States, the European Union, and other WTO Members as a way of enhancing existing WTO commitments on trade in services.

To me, this is the way forward for the WTO, and, importantly, this is a way that can be pursued without first getting agreement among all the more than 150 WTO Members, because it does not require any change whatsoever in current WTO rules. Those WTO Members wishing to make additional concessions and be bound by additional obligations can go ahead now and do so. All other WTO Members are then free to make those same new concessions and to benefit from those same new obligations should they choose to do so later.

The shared hope in taking this alternative approach to writing global rules is that, once a “critical mass” of WTO Members accounting for a sufficiently sizeable share of global trade have “acceded” to membership in such a “plurilateral” agreement, the economic pressures encouraging other WTO Members to sign that agreement will intensify, and that, in time, the “plurilateral” agreement will become fully “multilateral.” In fact, this is precisely what happened with the standards code I was handed decades ago at USTR, and with the similar GATT codes on subsidies and anti-dumping duties that were concluded in the Tokyo round. Eventually, they became fully multilateral agreements that bind all WTO Members as part of the WTO treaty.

The professed hope of all those so busy now negotiating regional agreements outside the framework of the WTO is that the regional standards they are negotiating will, with time, and with the accumulating pressure of economic necessity, become fully global. This could happen. This is, after all, what happened over time with the International Telegraph Union and with other standard-setting efforts that began with only a limited number of countries. The risk, however, of

these current efforts outside the WTO is that “regulatory protectionism” could become regional as well as national. If not applied carefully, regional and other partial efforts to harmonize standards outside the WTO may succeed only in raising new barriers to trade with those who are not part of those less-than-global understandings. Instead of building blocks, these regional efforts outside the WTO could become stumbling blocks to global harmonization.

The danger is that these regional efforts of integrating could become regional ways of discriminating unfairly. They could become exclusive, and not inclusive. Instead of bringing the world closer together, they could pull some parts of the world farther apart. This is in part because, as these regional agreements are currently contemplated, additional countries can join the negotiations only with the permission of the countries that are already engaged in them. Just the other day, for example, the United States announced that it will allow Japan to join in the negotiations on a Trans-Pacific Partnership. If the TPP negotiations were being conducted within the framework of the WTO, Japan would not need U.S. permission or permission from other negotiating countries. Japan would have an automatic right to participate if it wished to do so. So too would China and every other Member of the WTO.

The best forum by far for seeking global standards is the global forum of the WTO. The WTO is inclusive, not exclusive. WTO rules can only be building blocks. All those who are willing to accept and abide by WTO rules have the right to share if they choose in the bountiful benefits of WTO rules. On standards and on numerous other issues of global concern in the 21st century, “plurilateral” agreements negotiated within the WTO can become, over time, fully “multilateral” as more and more WTO Members come to realize the economic importance of embracing the common gauge of new obligations.

I fear that, in reciting so many words from the WTO treaty, I risk sounding in these thoughts too much like a lawyer. So I return, in conclusion, to the young Vladimir Nabokov, shivering with his family and their servants in the chill alongside the mismatched tracks at the Russo-German border, awaiting a railway connection in 1909. We know from his memoir that he never forgot that childhood experience.

As Nabokov wrote long afterwards, “We live not only in a world of thoughts, but also in a world of things. Words without experience are

meaningless.”³⁴ The things of life can shape our thoughts. The exchange of commerce can lead to other human exchanges. The relationships created by trading things can help establish and support other human relationships. The experience of mere commerce can have a meaning beyond things—if we find the right words.

Where standards are concerned, we must learn from the long experience of history, and we must employ this experience to write the right words as the right rules of international law. Many of the right words are already there in the WTO treaty. More are needed. The right words can help us create a meaning relating to things, and also a meaning beyond things, for a world awaiting the right connections. With the right words, we can further and facilitate the making for the world of common standards that can help us maximize global prosperity. With the right words, we can make a common gauge.

³⁴ VLADIMIR NABOKOV, *LOLITA* 178 (2nd ed. 1989).